STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 4, 2006
v	No. 259302 Osceola Circuit Court
ANTHONY ALAN GONZALES, Defendant-Appellant.	LC No. 04-003633-FH

Before: Neff, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of delivery of methamphetamine, in violation of MCL 333.7401(2)(b)(i). Defendant was sentenced as a habitual offender to 5 to 40 years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

A police informant and police officers participated in a controlled methamphetamine sale at defendant's residence. The informant testified that defendant personally sold the drugs to him in return for money provided by the officers. Defendant maintained that he was not at home during the alleged sale, and presented witnesses to corroborate his claim that he was shopping in Big Rapids at the time.

On appeal, defendant maintains that his trial counsel provided ineffective assistance when he failed to timely file notice of an alibi defense. See MCL 768.20. Defendant did not serve the prosecutor with a notice of alibi defense until June 30, 2004, fewer than ten days before trial. The prosecutor moved to have the defense excluded, but withdrew the motion and allowed defendant to present the alibi witnesses. Defense counsel agreed to refrain from bringing an oral motion to exclude any undisclosed witnesses. Defendant maintains that he was prejudiced by trial counsel's actions because the prosecutor was permitted to present rebuttal testimony from police officers who stated that they did not learn of the alleged alibi until shortly before trial.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must

show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id*. at 600. Where, as here, no *Ginther*[1] hearing has been conducted, our review of defendant's claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

Defendant maintains that counsel acted unprofessionally in failing to file a notice of alibi defense sooner. Defendant filed an affidavit in which he states that he informed his counsel about the alibi witnesses approximately three months before trial began. However, defendant has provided no evidence in support of his claim that defense counsel learned of the proposed alibi witnesses some months before filing the defense. In addition, even if defendant could show that counsel acted unreasonably, he could not show that the outcome would likely have been different without this error. Defendant was permitted to present his alibi witnesses. While defendant maintains that the late notice allowed the prosecutor to imply through the timing of the alibi notice that the defense witnesses fabricated the alibi, the prosecutor could have made the same implication if counsel had presented the notice sooner. Neither defendant's mother nor sister contacted the police to inform them that defendant was not present in the home on the day of the drug sale. Regardless of the timing of the notice, the fact that defendant's witnesses did not contact the police when it would have been logical for them to do so would likely have been explored by the prosecutor at trial. Defendant cannot show that he would likely have been acquitted had counsel presented an alibi notice earlier. He has not shown that he is entitled to relief on the ground that counsel provided ineffective assistance.

Next, defendant raises a number of challenges to his sentence. He concedes that his sentence of 5 to 40 years in prison fell within the sentencing guidelines range of 36 to 60 months. He contends, however, that the trial court abused its discretion in failing to depart downward from the minimum guidelines due to his substance addiction history, the small amount of methamphetamine involved here, and his strong rehabilitation potential. Defendant also argues that his sentence is not proportionate and that it constitutes cruel and unusual punishment.

Defendant is not entitled to resentencing. If a minimum sentence is within the appropriate sentencing guidelines range, we must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Defendant does not claim that the trial court relied on inaccurate information or erred when scoring the guidelines. Thus, he cannot show that he is entitled to relief.

We further disagree with defendant's underlying rationale for a downward departure. Reasons justifying departure must be objective and verifiable, should keenly or irresistibly grab the court's attention, and be recognized as having considerable worth in determining the length of a sentence. *People v Babcock*, 469 Mich 247, 256-257; 666 NW2d 231 (2003). The fact that defendant suffers from a substance abuse problem, while an objective fact, is not a particularly compelling one so as to justify a sentence below the guidelines. His claim of good rehabilitation

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

potential is refuted by his extensive criminal history and the fact that he was on parole at the time he committed the instant offense.

Moreover, defendant's claim that his sentence was disproportionate or cruel and unusual is without merit. A sentence within the sentencing guidelines is presumptively proportionate, *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). See also *Babcock*, *supra* at 261 (a sentence within the guidelines range is not subject to review for proportionality). A proportionate sentence does not constitute cruel and unusual punishment. *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002). Given defendant's repeated inability to conform his behavior to the law despite incarceration and participation in various inpatient programs, we find that his sentence is proportionate.

Further, we reject defendant's argument that he is entitled to resentencing pursuant to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *People v Claypool*, 470 Mich 715, 731 n 14; 684 NW2d 278 (2004), our Supreme Court held that *Blakely* is inapplicable to Michigan's sentencing scheme. We are bound by *Claypool*. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004).[2] *Blakely* does not entitle defendant to resentencing.

We affirm.

/s/ Janet T. Neff
/s/ Henry William Saad
/s/ Richard A. Bandstra

[2] On March 31, 2005, our Supreme Court granted leave to appeal in *Drohan*, limiting its review to whether *Blakely* and *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005) apply to Michigan's sentencing scheme. 472 Mich 881; 693 NW2d 823 (2005).